

1 BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

2 STATE OF MONTANA

3 * * * * *

4 BOARD OF TRUSTEES, BIG HORN)
COUNTY SCHOOL DISTRICT NO. 2 & 3,)

5 Appellant,)

6 vs.)

7 VERONICA ROSE CHESAREK and)
8 CANDACE L. O'HURLY,)

9 Respondents.)

OSPI 176-89

DECISION AND ORDER

10 * * * * *

11 STATEMENT OF THE CASE

12 O'Hurly and Chesarek ("Teachers"), were tenured teachers in
13 Big Horn county School District No. 2. In 1989 their contracts
14 were terminated. The terminations were appealed to the County
15 Superintendent pursuant to Sections 20-4-204, MCA. A hearing was
16 held on June 7, 1989.

17 County Superintendent Roberta Snively issued Findings of Fact,
18 Conclusions of Law and Order on July 20, 1989. She found that
19 the legal requirements of Section 20-4-204, MCA, were not met and
20 reinstated the Teachers. Trustees, Big Horn County School
21 District No. 2, appealed this decision to the State
22 Superintendent on August 17, 1989. The parties submitted briefs
23 and the matter was deemed submitted for decision.

24 DECISION AND ORDER

25 The State superintendent of Public Instruction has

1 jurisdiction of this appeal pursuant to Section 20-3-107, MCA.
2 The County Superintendent has jurisdiction to determine whether
3 there was a duly constituted quorum and properly convened board
4 meeting when the board acted to terminate the Teachers. This
5 matter is remanded to the County Superintendent with instructions
6 to receive evidence to decide that issue and further consider the
7 evidence in accordance with this Memorandum Opinion as necessary.

8 MEMORANDUM OPINION

9 The standard of review by the State Superintendent is set
10 forth in Rule 10.6.125, ARM. This rule was modeled upon Section
11 2-4-704, MCA, and the Montana Supreme Court has interpreted the
12 statute and the rule to mean that agency (County Superintendent)
13 findings of fact are subject to a clearly erroneous standard of
14 review and that conclusions of law are subject to an abuse of
15 discretion standard of review. Harris v. Bauer, ___ Mont. ___,
16 749 P.2d 1068, at 1071, 45 St. Rptr. 147, at 151 (1988).
17 Further, the petitioner for review bears the burden of showing
18 that they have been prejudiced by a clearly erroneous ruling.

19 Terry v. Board of Regents, 220 Mont. 214, at 217, 714 P.2d 151,
20 at 153 (1986). Findings are binding and not "clearly erroneous"
21 if supported by "substantial credible evidence in the record."
22 This has been further clarified to mean that a finding is clearly
23 erroneous if a "review of the record leaves the court with the
24 definite and firm conviction that a mistake has been committed."

25 The County Superintendent in her Notice of Scope of Hearing

1 dated May 23, **1989**, denied Petitioner's Motion to Expand Scope of
2 Hearing and refused to assume jurisdiction over issues which
3 basically comprise whether the decisions of the trustees were
4 valid in that they allegedly were made without a proper quorum.
5 This threshold question must be answered. Unless the decisions
6 of a board of trustees are made by a duly constituted quorum in
7 a properly convened board meeting, they have no validity or
8 effect.

9 The Montana Supreme Court in Canyon Creek Education
10 Association v. Board of Trustees, Yellowstone County School
11 District No. 4, ____ Mont. ____, 47 St. Rptr. **93**, 785 P.2d 201
12 (1990), citing Throssell v. Board of Trustees, ____ Mont. ____,
13 **45** St. Rptr. 1228, 757 P.2d **348** (1988), held that unless a
14 claimant's cause of action falls under the three exceptions
15 enumerated in Throssell, the administrative process must be
16 completed before resorting to the courts. These exceptions are
17 situations where state agencies have been directly granted
18 primary jurisdiction, where the matter is governed by a specific
19 statute or where the board has acted without or in excess of its
20 jurisdiction. Throssell, 757 P.2d at 349-50. This line of cases
21 gives us a very broad definition of "controversy" as it is used
22 in 20-3-107, MCA.

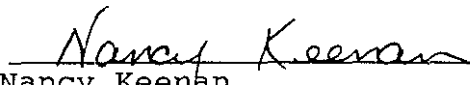
23 The County superintendent is charged with hearing and deciding
24 all matters of controversy arising in her county as a result of
25 decisions of the trustees of a district in the county. Section

1 20-3-210, MCA. In order for the County superintendent to hear
2 and decide a matter of controversy arising as a result of a
3 decision of the trustees of a district, the question of whether
4 a board has authority to make a decision in the first instance
5 must be answered. All business of a board of trustees must be
6 transacted at a properly called meeting by a quorum (majority) of
7 the membership. Section 20-3-322(4), MCA. In the presence of
8 the alleged facts, Section 20-3-308, MCA, appears to be
9 applicable, and except for (1)(g), the provisions are self
10 executing. This is a question within the broad case and
11 controversy jurisdictional authority of the county
12 superintendent.

13 If it is determined that the trustees did make a valid
14 decision, the recent Montana Supreme Court cases of Birrer v.
15 Trustees, Wheatland County School District No. 15, ____ Mont.
16 ____, 47 St. Rptr. 247, 786 P.2d 1161 (1990) and Raymond Harris
17 v. Trustees, Cascade County School Districts No. 6 and F, ____
18 Mont. ____, 47 St. Rptr. 260, 786 P.2d 1164 (1990), are
19 controlling. In both of those cases the procedural requirements
20 of section 20-4-204, MCA, were not met and although in no way
21 condoning the failure of the trustees to follow procedure, the
22 Court felt compelled to affirm the terminations because of the
23 unrefuted evidence of financial necessity. Similarly in the case
24 before me, the record establishes that procedural compliance was
25 far from perfect but the financial necessity unrefuted. These

1 Teachers are in the same position as Birrer and Harris. They
2 were not accorded all of their rights under the statute.
3 "Technical irregularities" and "substantial compliance" should
4 not to be condoned, but in the absence of any evidence
5 contradicting the financial status of the district, no
6 substantial prejudice to the Teachers can be shown. If it were
7 in the power of this Superintendent, as it was with the Court in
8 Birrer, she would award costs to Teachers.

9 DATED this 31 day of August, 1990.

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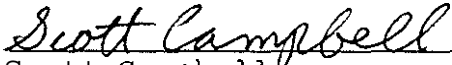
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 31st day of August, 1990, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to:

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